

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD ANDERSON,
 #42135

Plaintiff,

vs.

ROBERT BANNISTER, *et al.*,
 Defendants.

3:11-cv-00626-LRH-VPC

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. On September 29, 2011, the court dismissed plaintiff's complaint and granted him thirty (30) days to file an amended complaint if he was able to cure the stated deficiencies (ECF #4). After more than sixty (60) days had passed, on December 2, 2011, the court dismissed this action for failure to obey the court's Order (ECF #6), and judgment was entered (ECF #7). Now before the court is plaintiff's motion to amend/correct judgment (ECF #8).

I. Motion to Amend the Judgment

Where a ruling has resulted in final judgment or order, a motion for reconsideration may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Motions to reconsider are generally left to the discretion of the trial court. *See Combs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed on a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9th Cir. 1987). Rule 59(e) of the Federal Rules of Civil Procedure provides that any "motion to alter or amend a judgment shall be filed no later than 28 days after entry of the judgment." Furthermore, a motion under Fed. R. Civ. P. 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001), *quoting McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999).

In his motion, plaintiff states that he has not yet been able to amend his complaint to set forth Eighth Amendment medical claims because defendants have refused to arrange for him to see a specialist for his serious pain despite his repeated, written requests. Plaintiff misunderstands what he must allege in order to state an Eighth Amendment medical claim. As plaintiff is *pro se*, the court shall grant his motion to amend the judgment. Accordingly, the Order dated December 2, 2011 (ECF #6) is vacated. The judgment (ECF #7) is also vacated. Plaintiff shall have one more opportunity to file an amended complaint within thirty (30) days of the date of entry of this Order.

II. Eight Amendment Deliberate Indifference Standard

The court reminds plaintiff that the Eighth Amendment prohibits the imposition of cruel and unusual punishments and "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A detainee or prisoner's claim of inadequate medical care does not constitute cruel and unusual punishment unless the mistreatment rises to the level of "deliberate indifference to serious medical needs." *Id.* at 106. The "deliberate

1 indifference” standard involves an objective and a subjective prong. First, the alleged deprivation must
2 be, in objective terms, “sufficiently serious.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing
3 *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must act with a “sufficiently
4 culpable state of mind,” which entails more than mere negligence, but less than conduct undertaken for
5 the very purpose of causing harm. *Farmer*, 511 U.S. at 837. A prison official does not act in a
6 deliberately indifferent manner unless the official “knows of and disregards an excessive risk to inmate
7 health or safety.” *Id.*

8 In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner’s
9 civil rights have been abridged, “the indifference to his medical needs must be substantial. Mere
10 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.” *Broughton*
11 *v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06. “[A]
12 complaint that a physician has been negligent in diagnosing or treating a medical condition does not state
13 a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not
14 become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S.
15 at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v. Smith*,
16 974 F.2d 1050, 1050 (9th Cir. 1992) (*overruled on other grounds*), *WMX Techs., Inc. v. Miller*, 104 F.3d
17 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish deliberate
18 indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).
19 A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of deliberate
20 indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

21 Delay of, or interference with, medical treatment can also amount to deliberate indifference. *See*
22 *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898, 905 (9th Cir. 2002);
23 *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.
24 1996); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *McGuckin v. Smith*, 974 F.2d 1050, 1059
25 (9th Cir. 1992) *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, (9th Cir. 1997)
26 (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). Where the prisoner is alleging
27 that delay of medical treatment evinces deliberate indifference, however, the prisoner must show that
28 the delay led to further injury. *See Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at 1060; *Shapley*

1 *v. Nev. Bd. Of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam).

2 **Plaintiff may file an amended complaint if he is able to set forth specific allegations that**
 3 **specific defendants acted (or failed to act) with deliberate indifference to his serious medical needs.**

4 For example, in his motion to amend the judgment, plaintiff appears to say that Nevada Department of
 5 Corrections Medical Director Bannister has refused to arrange for plaintiff to be seen by a specialist or
 6 to provide other treatment, despite plaintiff's suffering serious pain from an allegedly botched surgery.
 7 This type of allegation would appear to state an Eighth Amendment medical claim, but must be set forth
 8 with specificity in an amended complaint.

9 Plaintiff is reminded that he should specifically identify each defendant to the best of his ability,
 10 clarify what constitutional right he believes each defendant has violated and support each claim with
 11 factual allegations about each defendant's actions or failure to act. There can be no liability under 42
 12 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions or
 13 inaction and the claimed deprivation. *Rizzo v. Goode*, 423 U.S. 362 (1976); *May v. Enomoto*, 633 F.2d
 14 164, 167 (9th Cir. 1980); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Plaintiff's claims must
 15 be set forth in short and plain terms, simply, concisely and directly. *See Swierkeiwicz v. Sorema N.A.*,
 16 534 U.S. 506, 514 (2002); Fed. R. Civ. P. 8.

17 Finally, plaintiff is reminded that the court cannot refer to a prior pleading in order to make
 18 plaintiff's amended complaint complete. Local Rule 15-1 requires that an amended complaint be
 19 complete in itself without reference to any prior pleading. This is because, as a general rule, an amended
 20 complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
 21 plaintiff files an amended complaint, the original pleading no longer serves any function in the case.
 22 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each
 23 defendant must be sufficiently alleged.

24 **III. Conclusion**

25 **IT IS THEREFORE ORDERED** that plaintiff's motion to amend/correct judgment (ECF #8)
 26 is **GRANTED**.

27 **IT IS FURTHER ORDERED** that the Order dated December 2, 2011 (ECF #6) is **VACATED**.

28 **IT IS FURTHER ORDERED** that the judgment entered on December 2, 2011 (ECF #7) is

1 **VACATED.**

2 **IT IS FURTHER ORDERED** that plaintiff shall have **thirty (30) days** from the date that this
3 Order is entered to file his amended complaint, if he believes he can correct the noted deficiencies. The
4 amended complaint must be a complete document in and of itself, and will supersede the original
5 complaint in its entirety. Any allegations, parties, or requests for relief from prior papers that are not
6 carried forward in the amended complaint will no longer be before the court.

7 **IT IS FURTHER ORDERED** that plaintiff shall clearly title the amended complaint as such
8 by placing the words "FIRST AMENDED" immediately above "Civil Rights Complaint Pursuant to 42
9 U.S.C. § 1983" on page 1 in the caption, and plaintiff shall place the case number, **3:11-CV-00626-**
10 **LRH-VPC**, above the words "FIRST AMENDED" in the space for "Case No."

11 **IT IS FURTHER ORDERED** that plaintiff is expressly cautioned that if he does not timely file
12 an amended complaint in compliance with this order, this case may be immediately dismissed.

13 **IT IS FURTHER ORDERED** that the Clerk shall send to plaintiff a blank section 1983 civil
14 rights complaint form with instructions along with one copy of the original complaint.

15 **IT IS FURTHER ORDERED** that plaintiff's application to proceed *in forma pauperis* (ECF
16 #1) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be required to pay an
17 initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to 28 U.S.C. § 1915,
18 as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is permitted to maintain
19 this action to conclusion without the necessity of prepayment of fees or costs or the giving of security
20 therefor. This order granting *in forma pauperis* status shall not extend to the issuance of subpoenas at
21 government expense.

22 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner
23 Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk of the
24 United States District Court, District of Nevada, 20% of the preceding month's deposits to the account
25 of Richard Anderson, **Inmate No. 42135** (in months that the account exceeds \$10.00) until the full \$350
26 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention of
27 Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011,
28 Carson City, NV 89702.

1 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
2 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
3 Prisoner Litigation Reform Act of 1996.

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5 DATED this 10th day of January, 2012.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE
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